



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: FEBRUARY 09, 2023

IN THE MATTER OF:

Appeal Board No. 626323

PRESENT: MARILYN P. O'MARA, MEMBER

The Department of Labor issued the initial determination holding the claimant eligible to receive benefits. The employer requested a hearing and objected, contending that the claimant should be disqualified from receiving benefits because the claimant lost employment through misconduct in connection with that employment and that wages paid to the claimant by such employer should not count in determining whether the claimant files a valid original claim in the future.

The Administrative Law Judge held a telephone conference hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances by the claimant and on behalf of the employer. By decision filed October 14, 2022 (), the Administrative Law Judge overruled the employer's objection and sustained the initial determination.

The employer appealed the Judge's decision to the Appeal Board.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant was employed full time as a news anchor for the employer, a faith-based radio station, for eight years. On October 20, 2021, the employer's news director and HR director met with the

claimant to issue a "Notice of Disciplinary Action." The notice cited to terms of the claimant's contract with the employer requiring newscasts to be delivered live except when circumstances warranted pre-recording, and then

only with permission from the director of radio operations. The notice also addressed the claimant's prior conduct of missing weekly staff meetings, failure to be on site one day each week, and failure to comply with the news director's repeated requests to stop using "political talking heads" in his news broadcasts. The notice stated, "Your unwillingness to follow these policies over the last few years, despite repeated notifications, is blatant disobedience and unacceptable."

On May 10, 2022, the claimant broadcasted the employer's 5:00 P.M. newscast covering topics including the economy and abortion protests and utilizing video and audio clips of several individuals including reporters and political individuals giving opinions. The employer considered the broadcast to be biased, not fact-based, and a violation of the employer's stated directive to provide balanced reporting without the use of "talking heads."

On May 25, 2022, the employer discharged the claimant because it concluded that he failed to follow the balanced news reporting practices and policies as directed by the news department director; failed to deliver all newscasts live or pre-recorded as close to airtime as feasible; failed to complete shifts as scheduled; and because he persistently wrangled to change the in-person work requirement.

The claimant had not been previously warned about biased reporting. The claimant's twin brother also worked for the employer and also did broadcasts. On many occasions, the claimant used the sound bites that his brother had used. The claimant's brother was not fired.

OPINION: The credible evidence establishes that the claimant was discharged because the employer concluded that he had failed to follow the balanced news reporting practices and policies as directed by the employer; had failed to deliver all newscasts live, or pre-recorded as close to airtime as feasible; and had failed to complete shifts as scheduled; and persistently attempted to change the in-person work requirement.

As to the latter three reasons for discharge, the evidence fails to establish that the claimant continued to engage in these prohibited behaviors after he was warned. Although the claimant continued to air what the employer considered to be biased and unbalanced newscasts by using what the employer considered to be "political talking heads", the employer failed to apprise the claimant that the use of these individuals in his broadcasts violated its

policy. We reject the CEO's contention that the claimant was spoken to on many occasions regarding this behavior, as the CEO could not recall the specific dates. Also, the CEO admitted he did not provide any written policy to the Department of Labor, and he did not produce any policy at the hearing. Further, the claimant had used the soundbites from his twin brother's broadcasts and his brother was still employed by the employer at the time of the hearing. The CEO admitted that the employer delayed firing the claimant because of "grace" and that he wanted to hold onto individuals like the claimant "as long as possible." While an employer has the right to discharge an employee for any lawful reasons, not all such reasons disqualify a claimant from receiving unemployment benefits. Here, the claimant was discharged for poor job performance which does not constitute misconduct under the Labor Law. Accordingly, we conclude that the claimant was separated from employment under non-disqualifying circumstances.

DECISION: The decision of the Administrative Law Judge is affirmed.

The employer's objection, that the claimant should be disqualified from receiving benefits because the claimant lost employment through misconduct in connection with that employment and that wages paid to the claimant by such employer should not count in determining whether the claimant files a valid original claim in the future, is overruled.

The initial determination, holding the claimant eligible to receive benefits, is sustained.

The claimant is allowed benefits with respect to the issues decided herein.

MARILYN P. O'MARA, MEMBER